

³ 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 26, 1989 appellant, then a 41-year-old maintenance worker filed a traumatic injury claim (Form CA-1) alleging that on August 25, 1989 he injured his right knee when a trash truck rolled back and pinned him against a fence while in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for right knee contusion, right hip strain, and left ankle contusion and abrasion. It paid wage-loss compensation on the periodic rolls, effective November 19, 1989.

On November 29, 1989 appellant underwent OWCP-approved right knee surgery.

On March 12, 1990 appellant returned to full-time, limited-duty work. His case file was administratively closed on May 7, 1992.⁵

On November 5, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained recurrences of disability commencing October 22, 2000, April 4, 2007, and January 7, 2008 due to his accepted August 25, 1989 employment injury.

In a letter dated November 5, 2015, appellant noted that he stopped working for the employing establishment in 1993. He alleged that he could not find employment due to his August 25, 1989 employment injury. Appellant explained that in 2011 he attempted to obtain a Commercial Driver's License, but was informed by his primary care provider that he would not pass the Department of Transportation (DOT) physical due to the deteriorating and unstable condition of his right leg.

In a November 30, 2015 development letter, OWCP advised appellant of the type of medical and factual evidence needed to establish his recurrence of disability claim and provided a questionnaire for his completion. It afforded him 30 days to submit the requested information.

⁴ Docket No. 19-0399 (issued August 1, 2019).

⁵ The evidence of record indicates that appellant stopped working for the employing establishment in 1993 and did not return to federal employment. Appellant continued to receive periodic medical treatment.

On December 16, 2015 OWCP received appellant's completed development questionnaire. Appellant indicated that the first recurrence occurred between 1999 and 2000 when his knee went out after he changed direction too quickly. He described that the second recurrence occurred in 2002 when his knee gave out while climbing in and out of a truck. Appellant explained that the third recurrence occurred in 2015 when his knee gave out while carrying groceries up a set of stairs. Appellant asserted that his recurrence of disability was related to his original injury because at the time of the August 25, 1989 employment injury, his primary physician had informed him that his condition would progressively worsen. He related that every primary physician since then had told him that his knee condition would deteriorate to the point of disability.

Appellant submitted several medical reports dated from 1989 to 1990 and diagnostic tests dated August 29, 1989, July 11, 2012, April 23, 2013, and October 31, 2015. He also submitted several medical lab reports, handwritten chart notes, sick request forms, health forms, and work status notes dated from 1994 through 2002. The evidence indicated that while he was incarcerated he continued to receive medical treatment for his right knee symptoms.

In a September 28, 2015 examination note, Dr. Annette Hall-Finney, an internist, reviewed appellant's history of injury and noted that a right knee x-ray showed degenerative changes and chondromalacia. She noted right knee examination findings of positive crepitus and pain with flexion of the right knee. Dr. Hall-Finney diagnosed right knee degenerative joint disease, status post trauma. She reported that appellant had informed her that he was unable to work as a truck driver because he could not pass the DOT physical.

In a December 24, 2015 report, Dr. Hall-Finney recounted appellant's complaints of worsening chronic right knee pain, right hip pain with climbing stairs, and right ankle pain with prolonged walking. She diagnosed right knee degenerative joint disease. Dr. Hall-Finney noted: "patient reports this stemmed from an injury in 1989 for which [appellant] underwent arthroscopic surgery and removal of damaged cartilage."

By decision dated February 8, 2016, OWCP denied appellant's claim for a recurrence of disability, finding that the medical evidence of record was insufficient to establish that he was disabled from work due to a material change/worsening of his accepted August 25, 1989 employment-related conditions.

On March 3, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.⁶ By decision dated September 20, 2016, an OWCP hearing representative affirmed the February 8, 2016 decision.

On August 11, 2017 appellant, through counsel, requested reconsideration. Counsel alleged that OWCP failed to fully develop and adjudicate the issue of whether appellant's right knee and subsequent disability was causally related to the accepted August 25, 1989 employment injury.

⁶ In his appeal request form, appellant indicated that he was requesting both an oral hearing and a review of the written record. The Branch of Hearings and Review conducted a review of the written record.

By decision dated November 15, 2017, OWCP affirmed the September 20, 2016 decision in part and modified the decision in part. It found that the medical evidence of record was sufficient to establish that appellant's right knee medial meniscus tear was causally related to the accepted August 25, 1989 employment injury. However, OWCP also determined that appellant had not met his burden of proof to establish a recurrence of disability due to a spontaneous worsening or change of his August 25, 1989 employment-related conditions.⁷

On July 18, 2018 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a July 1, 2018 report, Dr. Robert W. Macht, a general surgeon, described the August 25, 1989 employment injury and provided examination findings. He diagnosed right ankle contusion and postoperative status of right knee with medial meniscus tear.

By decision dated October 16, 2018, OWCP denied modification. Appellant appealed to the Board.

By decision dated August 1, 2019, the Board affirmed the October 16, 2018 decision. The Board found that appellant had not met his burden of proof to establish that he sustained a recurrence of disability on October 22, 2000, April 4, 2007, or January 7, 2008 causally related to his August 25, 1989 employment injury.

On October 11, 2019 appellant, through counsel, requested reconsideration⁸ and submitted additional medical evidence.

In a September 17, 2019 letter, Dr. Macht noted a date of injury of August 25, 1989. He reported: "[t]he cause of your torn medial meniscus (right knee) and contusion (soft tissue injury left ankle), is the August 25, 1989 accident." Dr. Macht explained that appellant's right knee surgery on November 29, 1989 demonstrated the tear and confirmed the injury.

By decision dated November 4, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

⁷ By separate decision dated November 15, 2017, OWCP formally expanded acceptance of appellant's claim to include right knee medial meniscus tear.

⁸ Although appellant claimed to be filing a request for reconsideration from the Board's August 1, 2019 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the August 1, 2019 Board decision was the last merit decision, the October 16, 2018 OWCP decision is the appropriate subject of possible modification by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA⁹ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹⁰

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On October 11, 2019 OWCP received appellant's timely request for reconsideration of the October 16, 2018 OWCP decision. It previously denied his claim because the medical evidence of record was insufficient to establish that he sustained a recurrence of disability on October 22, 2000, April 4, 2007, and January 7, 2008, causally related to his accepted August 25, 1989 employment injury. Thus, the Board must determine if appellant presented sufficient evidence or

⁹ *Supra* note 3.

¹⁰ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹² *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

¹³ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

argument regarding appellant's disability on the claimed dates to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹⁵

In his October 11, 2019 reconsideration request, counsel did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁶

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With his reconsideration request, appellant submitted a September 17, 2019 letter by Dr. Macht who opined that the August 25, 1989 employment incident was the cause of appellant's right knee medial meniscus tear and left ankle contusion. The Board finds that Dr. Macht's letter did not include any discussion of whether appellant was disabled from work commencing October 22, 2000, April 4, 2007, or January 7, 2008 due to a worsening of his August 25, 1989 employment-related conditions. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷ As appellant failed to provide relevant and pertinent new evidence related to the underlying issue of causal relationship, he was not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁸

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁹

On appeal, counsel argues that OWCP's October 16, 2018 decision is contrary to fact and law. As stated above, the evidence appellant submitted on reconsideration has not met the requirements to reopen his case for a review of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ See *C.S.*, Docket No. 20-0634 (issued September 25, 2020).

¹⁶ *Supra* note 8.

¹⁷ *D.C.*, Docket No. 19-0873 (issued January 27, 2020).

¹⁸ *Supra* note 8.

¹⁹ *H.T.*, Docket No. 20-0799 (issued November 6, 2020); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board